

No. SC92871

IN THE SUPREME COURT OF MISSOURI

LILLIAN M. LEWELLEN,

Appellant/Cross-Respondent,

v.

CHAD FRANKLIN

Respondent/Cross-Appellant,

and

CHAD FRANKLIN NATIONAL AUTO SALES NORTH, LLC

Respondent/Cross-Appellant.

**APPEAL FROM THE
CIRCUIT COURT OF CLAY COUNTY, MISSOURI
THE HONORABLE LARRY D. HARMAN
DIVISION 4**

APPELLANT'S BRIEF

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INTRODUCTION

Appellant/Cross-Respondent Lillian Lewellen brought a petition for common law fraudulent misrepresentation and unlawful merchandising practice under section 407.025¹ of the Missouri Merchandising Practice Act (MMPA) against Respondent/Cross-Appellant Chad Franklin. LF 24-38, 284-305. A Clay County jury returned verdicts of \$25,000 in actual damages and \$1,000,000 in punitive damages against Franklin for common law fraudulent misrepresentation, and \$25,000 in actual damages and \$1,000,000 in punitive damages against Franklin for unlawful merchandising practice. LF 541-42, 545-46; App. A25-A26. Lewellen elected to take the verdict of common law fraudulent misrepresentation against Franklin. LF 560-62, 740; App. A29-A31.

Lewellen filed a motion challenging the constitutionality of section 510.265,² the

¹ All references are to RSMo, Supp. 2010 unless otherwise noted.

² Section 510.265:

1. No award of punitive damages against any defendant shall exceed the greater of: (1) Five hundred thousand dollars; or (2) Five times the net amount of the judgment awarded to the plaintiff against the defendant. Such limitations shall not apply if the state of Missouri is the plaintiff requesting the award of punitive damages, or the defendant pleads guilty to or is convicted of a felony arising out of the acts or omissions pled by the plaintiff.
2. The provisions of this section shall not apply to civil actions brought under section

statutory cap on punitive damages, and the application of section 510.265 to the punitive damage award. LF 560, 563-565; App. A13, A29, A32-A35. The trial court reduced the punitive damage judgment against Franklin for common law fraudulent misrepresentation to \$500,000 pursuant to section 510.265. LF 741, 743-44; App. A8, A10-A11. The trial court overruled Lewellen's motion challenging the constitutionality of section 510.265 as to common law fraudulent misrepresentation. LF 742; App. A9.

Lewellen's challenge to the constitutionality of section 510.265 as applied to common law fraudulent misrepresentation is a matter of first impression for this Court.

213.111 that allege a violation of section 213.040, 213.045, 213.050, or 213.070, to the extent that the alleged violation of section 213.070 relates to or involves a violation of section 213.040, 213.045, or 213.050, or subdivision (3) of section 213.070 as it relates to housing.

JURISDICTIONAL STATEMENT

This appeal is from a jury trial in the Circuit Court of Clay County. The jury returned verdicts against Franklin for common law fraudulent misrepresentation and unlawful merchandising practice under section 407.025 of the MMPA. LF 541-42; App. A25-A26. The jury assessed actual damages of \$25,000 and punitive damages of \$1,000,000 for common law fraudulent misrepresentation against Franklin and actual damages of \$25,000 and punitive damages of \$1,000,000 for unlawful merchandising practice against Franklin. LF 541-42, 545-46; App. A25-A26. Lewellen elected to take the verdict for common law fraudulent misrepresentation against Franklin. LF 560-62, 740; App. A29-A31.

Post-trial, Lewellen filed a motion opposing the application of section 510.265 to the punitive damage awards and challenging the constitutionality of section 510.265 as a violation of the right to a trial by jury, separation of powers, equal protection, and due process. LF 560, 563-565; App. A29, A32-A34.

The trial court reduced the \$1,000,000 punitive damage verdict for common law fraudulent misrepresentation against Franklin to \$500,000 in accordance with section 510.265. LF 743; App. A10. The trial court overruled Lewellen's motion that section 510.265 is unconstitutional as to common law fraudulent misrepresentation. LF 742; App. A9.

Lewellen appeals the reduction of punitive damages against Franklin for common law fraudulent misrepresentation pursuant to section 510.265 as unconstitutional.

Lewellen challenges the constitutionality of section 510.265 as it violates the right to a trial by jury, separation of powers, equal protection, and due process. LF 560, 563-65; App. A29, A32-A34.

The challenge of section 510.265 to a common law fraudulent misrepresentation cause of action is within the exclusive jurisdiction of the Missouri Supreme Court, as the constitutionality of a Missouri statute is challenged. Mo. Const. art. V, § 3; *Watts v. Lester E. Cox Med. Ctrs*, 376 S.W.3d 633, 637 (Mo. banc 2012).

STATEMENT OF FACTS

A. Sale of the Car

In 2007, seventy-seven year old widow Lillian Lewellen went to National Auto Sales to buy a new car. TR 229, 235. Her 1994 Chrysler Town and County van had been in the shop for repairs and the transmission on the fourteen year old van was going out. TR 233. Lewellen needed a vehicle to drive to church and Wal-Mart. TR 304. Lewellen had seen Franklin's advertisements for cars with a \$49 a month payment on television. TR 234. After seeing these television advertisements several times a day, Lewellen decided to go see about buying a new car from Franklin's dealership. TR 234.

Lewellen went to Franklin's dealership, National Auto Sales, in North Kansas City, Missouri. TR 235. One of Franklin's employees at National Auto Sales sent Lewellen to the lot with cars that qualified for the \$49 a month payment. TR 236. Lewellen found a 2002 Lincoln to buy. TR 242. It was important to Lewellen that the payments were \$49 a month because her sole source of income was \$902 a month from social security. TR 229-30, 251.

Franklin's employee explained the \$49 a month payment as a five year deal in which Lewellen would pay \$49 a month, receive a check for the difference, and then trade in the car for a new car in a year and continue to pay \$49 a month. TR 237-38. Franklin's employee never explained to Lewellen what the difference was. TR 238. She felt the program was legitimate because there was a board listing the names of customers who purchased a car for \$49 a month. TR 247.

Lewellen felt pressured by the salesman, Phillip, to buy a car that day. TR 247-48. The entire process to buy the car took two to three hours. TR 246. The price of the 2002 Lincoln was \$17,699. TR 241-42. However, the total sales price was \$19,940.45. LF 245. The total price included: \$2,500 for a service contract, \$599 for gap insurance, \$750 for a license fee, and \$450 for a doc fee. TR 243-45. National Auto Sales did not tell Lewellen about these fees and she was not aware of any of them. TR 243-45. Lewellen received \$1,365 as the trade-in value for her 1994 Town and County van. TR 245. Again, Lewellen was not aware of the value of the trade-in. TR 245.

As she was purchasing the car, Lewellen again made it clear to Franklin's employees that she could only pay \$49 a month. TR 251. Franklin's finance employee again reiterated the monthly payments would be \$49 a month. TR 251-52. The credit application Franklin's dealership used showed Lewellen's monthly income was \$18,880 which was significantly more than her monthly income of \$920. TR 229-30, 268-69. The monthly payment amount was \$387.45 and the total sales price was \$19,940.45. TR 245, 259. Franklin's dealership told Lewellen that she would only pay \$49 a month, regardless of the figures in the paperwork, so she was not concerned about the higher monthly payments. TR 251-52.

After purchasing the Lincoln, Lewellen had to pay a licensing fee of \$1,252.38, sales tax of \$690.11, titling fee of \$850, agent fee of \$250, local taxes of \$551.27, and insurance of \$249.43 a quarter. TR 254-55, 312.

Lewellen had to call several times to get the check from Franklin and his

dealership to cover the difference. TR 257-58. Lewellen finally received a check for \$3,287.30 which covered the difference in payments for eight months. TR 258, 274, 310. No further funds were sent to Lewellen to cover the remaining four months. LF 278. Without the additional money, Lewellen was unable to pay the entire \$387.45 monthly payment. TR 259, 278. Lewellen called Harris Bank to inform the bank that she could not make the payments. TR 278. Harris Bank responded that was too bad and the bank wanted their money. TR 279-80. Lewellen kept making payments of \$49 a month, the amount she could afford. TR 280.

Harris Bank eventually repossessed the Lincoln, sued Lewellen for breach of contract, and turned the unpaid account over to a collection agency. TR 281-82. This left Lewellen without a car, causing an inconvenience to herself and her friends as she had to rely on friends for rides to church and Wal-Mart. TR 306. Lewellen was terrified that she would be sent to jail and was called monthly by the collection agency over the unpaid car loan. TR 282-84. During this time, Lewellen continued to pay \$25 to \$50 a month to the collection agency when she could. TR 308-10.

Lewellen experienced heart trouble and stress from this, which she attributed to Franklin. TR 289. Lewellen said she would not have bought the Lincoln if she knew the payments would increase or Franklin would not pay the difference. TR 285-86. She would not have bought the car because she could not afford it. TR 286.

B. Pre-Trial

After Lewellen was sued by Harris Bank, she filed a lawsuit against Franklin, National Auto Sales, and Harris Bank for common law fraudulent misrepresentation and unlawful merchandising practice under the MMPA. LF 24-58, 284-304. To enforce discovery, several motions were filed with the trial court. LF 96-218, 201-03, 216-33, 371-89.

Lewellen served notice to take Franklin's deposition for him personally and as a representative for National Auto Sales on three occasions, but Franklin failed to appear all three times. LF 86-95, 351-59, 361-69. Lewellen filed a motion to enforce discovery due to Franklin's failure to attend deposition and the trial court ordered Franklin to appear for a deposition. LF 371-75, 390. Franklin failed to appear when the trial court ordered the deposition. LF 405. As a result, Lewellen filed a motion for sanctions. LF 404-08.

The trial court imposed sanctions against Franklin. Before imposing sanctions, the trial court expressed:

Franklin, and as the [] corporate representative of Chad Franklin National Auto Sales, has intentionally violated the rules of discovery, has intentionally violated the court order to appear for depositions, that [] has caused prejudice to the clients, both in terms to the plaintiff, both in terms of trial preparation and proposed evidence that the plaintiff, perhaps, could seek to be admitted at trial, that the conduct is willful.

TR 63; App. A27. One sanction was the pleadings of Franklin and National Auto Sales were struck. In the trial stage, Franklin and National Auto Sales were precluded from introducing evidence in their defense. TR 64; App. A27. Additionally, the trial court ordered:

any documents that had been produced as a result of the discovery process by those two defendants [Franklin and National Auto Sales], if offered by plaintiff, can be admitted for purposes against Defendants Franklin, the Franklin defendants only.

TR 64; App. A27. Franklin and National Auto Sales were allowed to participate in voir dire to the limited extent of appropriate questions not asked by Lewellen, and cross examination “only to the issue of damages.” TR 90; App. A28.

C. Jury Trial

At trial Lewellen testified about her experience in this matter. TR 228-87, 303-13. Lewellen testified that she saw Franklin’s television commercials advertising cars for \$49 a month. TR 234. She told the jury about going to National Auto Sales and buying a 2002 Lincoln. LF 235. She said that Franklin’s employees told her that the payment would be \$49 a month, and Franklin and his business would send a check to cover the difference of the \$387.52 monthly payment. LF 237-38, 251-52. Lewellen testified that fees and services were added to the sales price, but she was not aware of that. LF 241-45. She told the jury that the check she received did not cover the full year, and she was unable to make the full payments on the car. LF 258, 279-80.

Glenna Overbey and David “Duck” Heckadon and others testified about similar experiences from buying cars from Franklin and his businesses. TR 316-30, 353-59. Requests for Admissions to Franklin and National Auto Sales were read into evidence. TR 214-18. In those admissions, Franklin admitted to owning National Auto Sales and that he is self-employed by buying and selling vehicles. TR 215, 217.

Business records from the Missouri Attorney General’s Office were admitted into evidence. TR 218-19. These records contained seventy-three complaints by customers of National Auto Sales against Franklin and other complaints about Franklin’s other dealerships. TR 218-20, 337, 349-50. Business records from the Kansas Attorney General’s Office showed numerous complaints by customers about Franklin. TR 332-34.

Emails from Franklin were admitted and read to the jury. TR 340-48. Portions of the email reveal that Franklin has to compete with his brother’s car dealership “for [his] share of the pie,” that the advertisements had to be “different,” “outside the box,” and “aggressive.” TR 341. Franklin stated the sales at his business were “pathetic.” TR 343. Franklin also decided to black out advertisements for a period of time, adding “ultimately it’s my decision.” TR 347. Franklin’s resume was admitted, in which he described himself as a “very hands-on owner” and “handling all advertising.” TR 348-349.

The jury returned a verdict on Lewellen’s claims against Franklin. LF 541-42, TR 393; App. A25-A26. The jury awarded Lewellen actual damages of \$25,000 for fraudulent misrepresentation and \$25,000 in actual damages for unlawful merchandising practice, and found Franklin liable for punitive damages. LF 541-42, TR 393, App A25.

The jury also returned verdicts against National Auto Sales of \$25,000 in actual damages for fraudulent misrepresentation and \$25,000 in actual damages for unlawful merchandising practice, and National Auto Sales liable for punitive damages. LF 543-44, TR 393.

In the punitive damage stage of trial, evidence of Franklin's finances was admitted. TR 396. In 2006, National Auto Sales had sales of \$15,754,000 and a gross profit of \$2,500,000. TR 396. In 2007, National Auto Sales had gross sales of \$12,000,000 and gross profit of \$2,100,000. TR 396-97. Lewellen filed Interrogatories and Franklin's responses were read into evidence. TR 398-400. In his response, Franklin pled his Fifth Amendment Right six times in regards to questions about his gross income, taxes paid, and net worth. TR 398-400. In response to Lewellen's Request for Production of Documentation, Franklin plead his Fifth Amendment right three times in regards to questions about his income taxes, net worth, and financial statements. TR 400-01.

The jury assessed punitive damages against Franklin of \$1,000,000 for fraudulent misrepresentation and \$1,000,000 for unlawful merchandising practice. LF 545-46, TR 426, App. A26. Punitive damages were assessed against National Auto Sales for \$1,000,000 for fraudulent misrepresentation and \$1,000,000 for unlawful merchandising practice. LF 547-48, TR 426.

D. Post-Trial

Lewellen elected to take the verdict, actual damages, and punitive damages against Franklin for fraudulent misrepresentation, while taking the verdict, actual damages, and punitive damages against National Auto Sales for unlawful merchandising practice. LF 560-62, 740; App. A29-A31.

Lewellen filed a motion opposing the application of section 510.265 to the punitive damage awards and challenged the constitutionality of section 510.265. LF 560, 563-65, App. A29, A32-34. The trial court found the actual damages were the same and Franklin and National Auto Sales were jointly and severally liable for \$25,000. LF 742-44; App. A9-A11. The trial court reduced the punitive damages for common law fraudulent misrepresentation against Franklin to \$500,000 pursuant to section 510.265. LF 743-44, App A10-A11. Punitive damages against National Auto Sales for unlawful merchandising practice were reduced to \$539,050 pursuant to section 510.265, which is five times the actual damages and attorney's fees. LF 743-44; App. A10-A11. Lewellen's motion challenging the constitutionality of section 510.265 was overruled. LF 742; App. A9. Lewellen appeals the constitutionality of section 510.265 to common law fraudulent misrepresentation.³ LF 746-50.

³ Lewellen does not appeal the reduction of the punitive damages against National Auto Sales for unlawful merchandise practice. *See Estate of Overbey v. Chad Franklin Nat'l Auto. Sales North, LLC*, 361 S.W.3d 364 (Mo. banc 2012).

POINTS RELIED ON

- I. The trial court erred in reducing Lewellen’s punitive damage award in her common law fraudulent misrepresentation cause of action pursuant to section 510.265, because section 510.265 violates Lewellen’s right to a trial by jury as guaranteed by article I, section 22(a) of the Missouri Constitution, in that Lewellen’s right to a trial by jury does not remain inviolate when a jury’s verdict for punitive damages in a common law fraudulent misrepresentation cause of action is subject to statutory limitations which did not exist in 1820, thereby implicating her right to a trial by jury and making the her final award of punitive damages for common law fraudulent misrepresentation inadequate.**

Watts v. Lester E. Cox Med. Ctrs, 376 S.W.3d 633 (Mo. banc 2012).

Estate of Overbey v. Chad Franklin Nat’l Auto. Sales North, LLC, 361 S.W.3d 364 (Mo. banc 2012)

Scott v. Blue Springs Ford Sales, Inc., 176 S.W.3d 140 (Mo. banc 2005)

State ex rel. Diehl v. O’Malley, 95 S.W.3d 82 (Mo. banc 2003)

Mo. Const. art. I, § 22(a)

Section 510.265

II. The trial court erred in reducing Lewellen’s punitive damage award in a common law fraudulent misrepresentation cause of action pursuant to section 510.265, because section 510.265 violates the separation of powers prescribed by article II, section 1, of the Missouri Constitution, in that section 510.265 infringes on the judiciary’s role and discretion to decide and pronounce judgments, thereby making Lewellen’s final punitive damage award for common law fraudulent misrepresentation inadequate as the award is mandated by section 510.265 and not on the evidence in the particular case.

Mo. Coalition for the Env’t v. Joint Comm. on Admin. Rules, 948 S.W.2d 125 (Mo. banc 1997)

State Auditor v. Joint Comm. on Legis. Research, 956 S.W.2d 228 (Mo. banc 1997).

Klotz v. St. Anthony’s Med. Ctr., 311 S.W.3d 752 (Mo. banc 2010)

Bayer Corpscience LP v. Schafer, 385 S.W.3d 822 (Ark. 2011)

Mo. Const. art. II, § 1

Section 510.265

III. The trial court erred in reducing Lewellen’s punitive damage award in a common law fraudulent misrepresentation cause of action pursuant to section 510.265, because section 510.265 violates Lewellen’s right to equal protection as guaranteed by article I, section 2 of the Missouri Constitution and the Fourteenth Amendment of the United States Constitution, in that the right to a trial by jury for a common law cause of action is a fundamental right and there is not a compelling state interest to restrict the jury’s assessment of punitive damages to punish and deter, or in the alternative there is no rational relationship in limiting punitive damages to achieve a legitimate end to have punitive damages punish and deter, thereby making the final punitive damage award for common law fraudulent misrepresentation inadequate.

Doe v. Phillips, 194 S.W.3d 833 (Mo. banc 2006)

Watts v. Lester E. Cox Med. Ctrs, 376 S.W.3d 633 (Mo. banc 2012).

Comm. for Educ. Equality v. State of Mo., 294 S.W.3d 477 (Mo. banc 2009)

Hodges v. Easton, 106 U.S. 408 (1882)

Mo. Const. art. I, § 2

U.S. Const. amend. XIV

Section 510.265

IV. The trial court erred in reducing Lewellen’s punitive damage award in common law fraudulent misrepresentation cause of action pursuant to section 510.265, because section 510.265 violates the due process clause of article I, section 10 of the Missouri Constitution and the Fourteenth Amendment of the United States Constitution, in that section 510.265 changes the substantive law for common law fraudulent misrepresentation and is a mathematical bright line thereby eliminating a due process review of the jury’s punitive damage verdict, making Lewellen’s punitive damage award for common law fraudulent misrepresentation inadequate as it was not reviewed for being excessive.

Scott v. Blue Springs Ford Sales, Inc., 176 S.W.3d 140 (Mo. banc 2005)

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003)

BMW of North Am. v. Gore, 517 US 559 (1996).

Pacific Mut. Life Ins. Co. v. Haslip, 499 US 1 (1991)

U.S. Const. amend XIV

Mo. Const. art. I, §10

Section 510.265

ARGUMENTS

I. The trial court erred in reducing Lewellen’s punitive damage award in her common law fraudulent misrepresentation cause of action pursuant to section 510.265, because section 510.265 violates Lewellen’s right to a trial by jury as guaranteed by article I, section 22(a) of the Missouri Constitution, in that Lewellen’s right to a trial by jury does not remain inviolate when a jury’s verdict for punitive damages in a common law fraudulent misrepresentation cause of action is subject to statutory limitations which did not exist in 1820, thereby implicating her right to a trial by jury and making the her final award of punitive damages for common law fraudulent misrepresentation inadequate.

A. Standard of Review

A constitutional challenge is reviewed *de novo*. *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 637 (Mo. banc 2012). The presumption is a statute is constitutional. *Id.* A statute is unconstitutional if it “clearly contravenes a constitutional provision.” *Id.* The party challenging the statute bears the burden to prove the statute “clearly and undoubtedly violate[s] the constitution.” *Id.*

B. The right to a trial by jury “as heretofore enjoyed shall remain inviolate”

A common law fraudulent misrepresentation cause of action seeking punitive damages is protected by the right to a trial by jury. The Missouri Constitution guarantees the right to a “trial by jury as heretofore enjoyed shall remain inviolate.” Mo. Const. art.

I, § 22(a). This right “means that all the substantial incidents and consequences which pertained to the right of trial by jury, are beyond the reach of hostile legislation, and are preserved in their ancient substantial extent as existed at common law.” *Lee v. Conran*, 111 S.W. 1151, 1153 (Mo. 1908). This right is a guarantee, not a restriction. *State ex rel. Diehl v. O’Malley*, 95 S.W.3d 82, 84 (Mo. banc 2003).

As a constitutional provision, article I, section 22(a) is to be read broadly due to the “permanent character.” *Brown v. Carnahan*, 370 S.W.3d 637, 647 (Mo. banc 2012). The words are given “the meaning that the people understood them to have when the provision was adopted.” *Farmer v. Kinder*, 89 S.W.3d 447, 452 (Mo. banc 2002).

The right to a trial by jury is dependent on “as heretofore enjoyed” and “shall remain inviolate.” “As heretofore enjoyed” means “citizens of Missouri are entitled to a jury trial in all actions to which they would have been entitled to a jury when the Missouri Constitution was adopted in 1820.” *Watts*, 376 S.W.3d at 638. The right applies to claims “analogous to” a cause tried to a jury in 1820, when the Constitution was adopted. *Watts*, 376 S.W.3d at 637-38; *Diehl*, 95 S.W.3d at 87. In 1820, the right to a jury trial applied to actions at law, where monetary damages were at issue. *Diehl*, 95 S.W.3d at 85-86. The right to a trial by jury is also dependent on common law limitations on a jury’s award of damages. *Watts*, 376 S.W.3d at 638.

Lewellen’s petition for fraudulent misrepresentation seeking punitive damages is analogous to actions tried to a jury in 1820. Fraud claims were analogous to trespass at common law, which were tried to a jury in 1820. *Diehl*, 95 S.W.3d at 87 n.9. Punitive

damages were recoverable as damages in 1820. *Estate of Overbey v. Chad Franklin Nat'l Auto. Sales North, LLC*, 361 S.W.3d 364, 375 (Mo. banc 2012); *Scott v. Blue Springs Ford Sales, Inc.*, 176 S.W.3d 140, 142 (Mo. banc 2005). At common law, the jury had the sole discretion to award punitive damages and the amount of the punitive damages. *Grier v. Kansas City C.C. & St. J. Ry. Co.*, 228 S.W. 454, 460 (Mo. banc 1921); *Mitchell v. Pla-Mor, Inc.*, 237 S.W.2d 189, 191 (Mo. 1951). This Court has reiterated the common law principle that a jury is to determine the amount of damages, which includes punitive damages. *Overbey*, 361 S.W.3d at 376; *Scott*, 176 S.W.3d at 142; *Diehl*, 95 S.W.3d at 84, 89. Missouri's common law provided the right to a trial by jury to determine punitive damages in a fraud cause of action; therefore, Lewellen's right to a trial by jury for punitive damages in her common law fraudulent misrepresentation claim is "as heretofore enjoyed." *See Watts*, 376 S.W.3d at 638.

"Shall remain inviolate" means the common law right to a trial by jury cannot be changed. *Watts*, 376 S.W.3d at 638. Inviolable means "free from change or blemish, pure or unbroken." *Watts*, 376 S.W.3d at 638 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1190 (1993)). The use of the word "shall" means it is mandatory and must be followed. *Dorris v. State*, 360 S.W.3d 260, 267 (Mo. banc 2012). "If the statutory cap changes the common law right to a jury determination of damages, the right to trial by jury does not 'remain inviolate' and the cap is unconstitutional." *Watts*, 376 S.W.3d at 638.

In 1820, there was the right to a trial by jury for common law causes of action.

There were no restrictions on the right to a trial by jury and no statutory restrictions on punitive damages awarded. Broadly reading article I, section 22(a), the right to a trial by jury includes having a jury determine punitive damages and the punitive damage judgment is not statutorily limited. *See Brown*, 370 S.W.3d at 647; *Farmer*, 89 S.W.3d at 452. When the framers of the Missouri Constitution set forth the right to a trial by jury, they intended for the right to exist as it did in 1820. That was for punitive damages to be determined and reduced as was permissible in 1820, which did not include a statutory limitation on punitive damages. *See Watts*, 376 S.W.3d at 640. Section 510.265 changes the right to a trial by jury by imposing limitations on the amount of punitive damages recovered. The right to a trial by jury no longer exists as it did in 1820, therefore, the right to a trial by jury no longer “remains inviolate.”

Section 510.265 changes the determination of punitive damages by limiting punitive damages to the greater of \$500,000 or five times the net damages. Section 510.265. Punitive damages were not limited by a statute in 1820. Since a plaintiff was entitled to a jury trial under Missouri common law for punitive damages arising out of a fraud claim in 1820, Lewellen “has a constitutional right to a jury trial on her claim for damages” for common law fraudulent misrepresentation. *Watts*, 376 S.W.3d at 637. Lewellen’s right to a trial by jury does not “remain inviolate” because the right does not exist as it did in 1820 as section 510.265 limits the punitive damages awarded by the jury.⁴

⁴ Other courts have found statutory limitations on punitive damages violate the right to

C. Section 510.265 violates the right to a trial by jury for common law fraudulent misrepresentation

The right to a trial by jury is not “as heretofore enjoyed shall remain inviolate” by the application of section 510.265. Section 510.265 imposes a statutory limitation on punitive damages that exceed the greater of \$500,000 or five times the net damages, unless one of three exceptions applies. Section 510.265.

This Court has already held section 538.210, statutory limitations on non-economic damages, applied to a common law cause of action violates the right to a trial by jury. *Watts*, 376 S.W.3d at 638; ⁵ App. A14-A15. This Court found “if the statutory

trial by jury. In Alabama, a statutory cap of punitive damages was found to violate the “right of trial by jury shall remain inviolate.” *Henderson v. Alabama Power Co.*, 627 So.2d 878, 894 (1993). The application of this statute is unclear as it was abrogated by a criminal law matter. *See Ex parte Apicella*, 809 So.2d 865 (Ala. 2001). The Ohio Supreme Court, in dicta, found a statute limiting punitive damages violated the right to trial by jury, before striking down a tort reform law *in toto*. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1090-91 (Ohio 1999). The Ohio Supreme Court later refused to follow *Sheward*, because it was in dicta. *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 487 (Ohio 2007).

⁵ *Watts*, 376 S.W.3d 633 overruled *Adams, By and Through Adams v. Children’s Mercy Hosp.*, 832 S.W.2d 898 (Mo. banc 1992) holding section 538.210, the statutory cap on non-economic damages, did not violate the right to trial by jury.

cap changes the common law right to a jury determination of damages, the right to trial by jury does not ‘remain inviolate’ and the cap is unconstitutional.” *Id.* Chief Justice Teitelman emphasized that section 538.210, the non-economic damage cap, “operates wholly independent of the facts of the case” and “directly curtails the jury’s determination of damages and, as a result, necessarily infringes on the right to trial by jury when applied to a cause of action to which the right to jury trial attaches at common law.” *Id.* at 640.

Lewellen should follow and extend *Watts*, in that statutory limitations on punitive damages in a common law cause of action violates the right to a trial by jury. The right to punitive damages existed at common law and there were no statutory restrictions on the damages until 2005. The Court “has the duty to prescribe the trial process and to protect those rights to jury trial as existed prior to 1820” and the legislature may not negate causes of action or remedies that existed prior to 1820. *Sanders v. Ahmed*, 364 S.W.3d 195, 205 (Mo. banc 2012). Chief Justice Teitelman’s explanation in *Watts* that “because the common law did not provide for legislative limits on the jury’s assessment of civil damages, Missouri citizens retain their individual right to trial by jury subject only to judicial remittitur based on the evidence in the case,” 376 S.W.3d at 640, equally applies to the statutory limitation on punitive damages. At common law, punitive damages were not statutorily limited, the damages could only be reduced by remittitur. *Call v. Heard*, 925 S.W.2d 840, 849 (Mo. banc 1996). For the right to a trial by jury to remain “inviolat,” punitive damages in a common law fraudulent misrepresentation

cause of action shall not be statutorily limited.

Punitive damages and non-economic damages are analogous as both measure intangible factors. Unlike actual damages, punitive damages and non-economic damages are subjective figures, highly dependent on the facts and circumstances of a matter. Punitive damages are slightly less subjective as the appropriate figure can be based on a defendant's finances. For examples, in Lewellen's case evidence of Franklin's sales and profits were admitted, giving the jury an idea about his finances to ascertain an appropriate punishment. LF 396-401. Given that non-economic and punitive damages are based on intangible factors, the analyses and arguments for the statutory limitations on non-economic damages should apply to punitive damages.

Lewellen is distinguishable from the cases upholding statutory limitations in causes of action created by statute. *See Overbey*, 361 S.W.3d at 376 (punitive damages under section 510.265 for a claim under the MMPA), *Sanders*, 364 S.W.3d at 205 (non-economic damages under section 538.210 for a wrongful death claim). As the Court distinguished in *Overbey* and *Sanders*, the legislature can restrict damages on claims it creates. *Overbey*, 361 S.W.3d at 376; *Sanders*, 364 S.W.3d at 205. Lewellen is different, as she brought a common law fraudulent misrepresentation claim. LF 291-295. The Court in *Overbey* said the party "chose to bring a statutory claim under the MMPA rather than a common law fraud claim. The substance of their claim, therefore, must be determined by reference to the MMPA rather than by reference to the common law." *Overbey*, 361 S.W.3d at 376. This implies that section 510.265 applied to common law

causes of action violates the right to a trial by jury. *Id.*

For the full meaning of *Scott* to apply, it should be extended to allow the jury to assess the full amount of damages. In *Scott*, the MMPA provided for punitive damages but did not allow a jury to determine the damages. *Scott*, 176 S.W.3d at 141-42. This Court held that a jury is to determine punitive damages. *Id.* at 142. Here, the jury is allowed to award punitive damages for a common law cause of action, but the punitive damages awarded are subject to limitations imposed by section 510.265. The jury's right to determine punitive damages in a common law cause of action were not subject to statutory limitations in 1820. Section 510.265 is not constitutional as it allows for the jury to determine punitive damages, but that is limited to an arbitrary amount imposed by section 510.265. For the right to a trial by jury to remain inviolate, that right must exist as it did at common law. At common law, the jury's determination of punitive damages was not statutorily limited. *Scott* should be extended to allow the jury full determination of punitive damages in a common law claim.

Section 510.265 violates article I, section 22(a). Punitive damages are to be determined by the jury and are protected by article I, section 22(a). *Overbey*, 361 S.W.3d at 376-77, *Scott*, 176 S.W.3d at 142. Section 510.265 "retains the common law action but displaces the findings of the jury with a legislated limitation on damages." *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 779 (Mo. banc 2010) (Wolff, J., concurring). Therefore, in a common law cause of action, punitive damages shall not be statutorily limited as the right to a trial by jury does not remain inviolate.

D. Section 510.265 is hostile legislation that violates the right to a trial by jury

Section 510.265 is hostile legislation in that it does not allow for the full benefit of the right to a trial by jury.

1. Section 510.265 is hostile legislation that destroys common law

When the right to a trial by jury attaches, “the plaintiff has the full benefit of that right free from the reach of hostile legislation.” *Watts*, 376 S.W.3d at 640. This constitutional right is violated when the jury’s verdict of punitive damages in a common law claim is arbitrarily reduced by section 510.265.

At common law, punitive damages were not subject to statutory limitations. The jury awarded punitive damages. *Grier*, 228 S.W. at 460; *Mitchell*, 237 S.W.2d at 191. Then the trial and appellate courts would review the punitive damage award. *Call*, 925 S.W.2d at 849. Punitive damages might be reduced by remittitur, if the evidence supports the reduction. *Watts*, 376 S.W.3d at 640. This Court has noted that “it is not the province of this court to weigh the testimony for the purpose of ascertaining whether the jury found too much or too little....the court very properly told the jury that it was their province to find the amount of damages, if any had been sustained.” *Steinberg v. Gebhardt*, 1867 WL 4773 *1 (Mo. October 1867).

Remittitur is a common law practice that reduces damages not supported by evidence and provides the plaintiff the option of a new trial or the reduced damages. *Klotz*, 311 S.W.3d at 777 (Wolff, J., concurring). Punitive damages are remitted when the punitive damage judgment is disproportionate that it “reveals improper motives or a

clear absence of the honest exercise of judgment.” *Call*, 925 S.W.2d at 849. Section 510.265 is not remittitur, it is an arbitrary reduction of damages that does not consider the evidence and does not provide the option of a new trial instead of the reduced damages. *See Klotz*, 311 S.W.3d at 779-80 (Wolff, J., concurring). Section 510.265 is hostile legislation because it replaces the remittitur process by mandating a jury’s verdict exceeding the statutory limitations be reduced to an amount deemed appropriate by the legislature. The jury’s verdict in excess of section 510.265 is simply a signal that section 510.265 applies.

Lewellen’s case illustrates the hostile nature of section 510.265. The jury awarded punitive damages of \$1,000,000 after a jury trial where Franklin’s petition had been struck as a result of sanctions, Franklin failed to appear for depositions, Franklin failed to appear at trial, and Franklin plead his Fifth Amendment right in response to admissions and request for productions. LF 86-95, 351-59, 361-69, 405; TR 36-64, 392. Regardless of this, the trial court was still required to reduce punitive damages to \$500,000 pursuant to section 510.265. LF 743-44; App. A10-A11. The trial court could not consider if the jury’s verdict was supported by the evidence and Lewellen was not given the option of a new trial. LF 553-59, 734-45; App. A1-A3. Section 510.265 is hostile legislation that mandates the reduction of punitive damages without any consideration to the evidence. Section 510.265 destroys common law as it changes the right to a trial by jury for common law causes of action by mandating the reduction of punitive damage awards.

2. Section 510.265 implicates the right to a trial by jury at common law

Lewellen's right to a trial by jury is implicated by section 510.265 in two significant ways. First, it takes away the power of the jury to punish and deter based on the evidence. Second, it lessens the significance of a jury trial.

The jury represents the public and expresses the public's opinion. Since the purpose of punitive damages is to punish, set an example, and deter similar action, *Overbey*, 361 S.W.3d at 382 (Teitelman, J., dissenting), the jury is in the best position to weigh the evidence and determine "what amount this particular defendant should be made to pay so that the penalty will act as an effective deterrent," *Price v. Ford Motor Credit Co.*, 530 S.W.2d 249, 256 (Mo. App. W.D. 1975). The jury has heard the evidence in the particular case and can award punitive damages in an amount that will punish the specific defendant and deter others. The jury's punitive damage verdict should be upheld, unless there is evidence of bias or not supported by the evidence. *See Barnett v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639, 660 (Mo. App. W.D. 1997). The jury's verdict should not be subject to the legislature acting as a super juror by reducing the jury's verdict to what the legislature believes is appropriate.

Section 510.265 prohibits the jury's assessment of punishment and deterrence when a punitive damage award exceeds \$500,000 or five times the net damages. Section 510.265 prevents the assessment of a punitive damage award which sufficiently punishes and deters the defendant, because it establishes the maximum amount of a punishment without considering the facts and circumstances of the matter. *See Overbey*, 361 S.W.3d

at 382 (Teitelman, J., dissenting).

Section 510.265 eliminates the need to have a jury trial. When there is the possibility of large punitive damages but small actual damages, there is no incentive to have a jury trial as a large punitive damage award will be reduced pursuant to section 510.265. Section 510.265 eliminates the incentive for a jury trial because the parties know the maximum amount of damages available to negotiate a settlement.

Section 510.265 raises serious concerns about exercising the right to a trial by jury when the jury's punitive damages verdict exceeds the statutory maximum. This Court has held that the jury has the sole authority to determine punitive damages. *See Scott*, 176 S.W.3d at 142. No purpose is served to have the jury award punitive damages, and then have those damages be mandatorily reduced pursuant to section 510.265 to \$500,000 or five times the net damages, unless a statutory exemption under section 510.265 applies. In reality, section 510.265 makes the right to a trial by jury a show. A jury assesses punitive damages and by its verdict awards an amount they believe will sufficiently punish the defendant and deter others from such conduct, not knowing that any amount they award is limited by the law and will be reduced to a lesser amount. The public perception is that the defendant is being punished and others will be deterred from doing similar acts. Then, the amount is reduced by section 510.265. There is no consideration as to whether the award is supported by the evidence for remittitur, no due process analysis, no assessment as to the conduct at issue, or what would be a sufficient punishment or deterrence.

Section 510.265 creates an unlevelled playing field for plaintiffs and defendants. Traditionally, a jury trial is a risk to both plaintiff and defendant. By not settling, a plaintiff risks not receiving any damages and a defendant exposes himself to unlimited damages. Section 510.265 changes the playing field for a defendant as his exposure to punitive damages is limited. A plaintiff does not have the benefit of a similar statute guaranteeing actual losses will be recovered. Section 510.265 amounts to a burden on a plaintiff's right to a trial by jury in that the amount of punitive damages awarded are limited, but is a benefit to defendants in that their exposure in punitive damages is limited. Section 510.265 skews the right to a trial by jury in that it benefits defendants by limiting their exposure.

Lewellen's case illustrates this. Franklin demanded a jury trial and continued to demand a jury trial after sanctions were imposed and his pleadings were struck by the trial court. LF 324, 344, TR 63-64. Franklin had been the defendant in two very similar cases in Clay County within the past two years, and he had punitive damages of \$1,000,000 and \$400,000 assessed against him. *See Overbey*, 361 S.W.3d 364, *Heckadon v. CFS Enterprises, Inc.*, WD 74288 (App. W.D. submitted Oct. 31, 2012).⁶ In continuing with a jury trial, Franklin took full advantage of section 510.265. Franklin knew that no matter what the jury's verdict on punitive damages would be, the final punitive damage award would not exceed \$500,000 due to section 510.265. Franklin had

⁶ The cases at the circuit level are: *Overbey v. Chad Franklin Nat'l Auto. Sales North, LLC*, 08CY-CV12436; *Heckadon v. CFS Enterprises, Inc.*, 09CY-CR13553.

nothing to lose by going to trial. Section 510.265 completely eliminates a defendant's risk of going to trial. Section 510.265 makes a mockery out of our judicial system, as it allows for Franklin to refuse to comply with the rules of law, but have a \$1,000,000 jury verdict for punitive damages reduced by the courts as directed by the legislature. There is not valid reason to reduce punitive damages, especially in this situation.

Section 510.265 is hostile legislation as it destroys common law and reduces the incentive to have a jury trial.

E. Conclusion

Section 510.265 violates Lewellen's right to a trial by jury at common law. In 1820, there was not a statutory limitation on punitive damages, specifically for fraud. Therefore, section 510.265 violates the right to a trial by jury as the "Statutory caps on damages in cases in which the right to trial by jury applies necessarily changes and impairs the right of trial by jury 'as heretofore enjoyed.'" *Watts*, 376 S.W.3d at 640. Lewellen's "individual right to trial by jury cannot 'remain inviolate' when an injured party is deprived of the jury's constitutionally assigned role of determining damages according to the particular facts of the case." *Id.* Section 510.265 is unconstitutional as it clearly contravenes the right to a trial by jury in article I, section 22(a) of the Missouri Constitution.

II. The trial court erred in reducing Lewellen’s punitive damage award in a common law fraudulent misrepresentation cause of action pursuant to section 510.265, because section 510.265 violates the separation of powers prescribed by article II, section 1, of the Missouri Constitution, in that section 510.265 infringes on the judiciary’s role and discretion to decide and pronounce judgments, thereby making Lewellen’s final punitive damage award for common law fraudulent misrepresentation inadequate as the award is mandated by section 510.265 and not on the evidence in the particular case.

A. Standard of Review

A constitutional challenge is reviewed *de novo*. *Watts*, 376 S.W.3d at 637. The presumption is a statute is constitutional. *Id.* A statute is unconstitutional if it “clearly contravenes a constitutional provision.” *Id.* The party challenging the statute bears the burden to prove the statute “clearly and undoubtedly violate[s] the constitution.” *Id.*

B. Article II, section 1 guarantees the separation of powers

Section 510.265 violates the separation of powers prescribed in article II, section 1 of the Missouri Constitution by eliminating the judiciary’s discretion in awarding punitive damages as section 510.265 mandates the maximum amount a punitive damage award may be. The Missouri Constitution prohibits one branch of government from exercising powers designated to another branch. Mo. Const. art. II, § 1. Thus, the three branches should be as separate and independent as possible. *Mo. Coalition for the Env’t v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 132-33 (Mo. banc 1997). Article II,

section 1 is “vital to our form of government, because it prevents the abuses that can flow from centralization of power.” *Id.* at 132 (internal quotations and citations omitted).

The judiciary is the only branch with the ability to determine what the law is. *Id.* at 132 (citing *Marbury v. Madison*, 5 U.S. 137 (1803)). This is the only branch that can determine if a law is constitutional. *Id.* The judiciary is vested with “the power to decide and pronounce a judgment and carry it into effect.” *Percy Kent Bag Co. v. Mo. Comm’n on Human Rights*, 632 S.W.2d 480, 484 (Mo. banc 1982). The legislative branch “cannot entirely exclude the exercise of the discretion of the Court” as that is an encroachment on the judicial branch. *Kyger v. Koerper*, 207 S.W.2d 46, 49 (Mo. banc 1946) (Hyde, J., concurring). Judge Draper argued in *Sanders* that the statutory limitation of non-economic damages in section 538.210 violated the separation of powers as it “encroaches on the judicial prerogative of remittitur in determining whether the jury’s assessment of damages is appropriate on a case-by-case basis.” *Sanders*, 364 S.W.3d at 215 (Draper, J., dissenting).

Meanwhile, the legislative branch’s power is limited to enacting laws. *Mo. Coalition for the Env’t*, 948 S.W.2d at 134. The legislature’s power ends when it enacts the legislation. *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 231 (Mo. banc 1997).

Section 510.265 violates the separation of powers when it is applied to common law causes of action. At common law, punitive damages could only be reduced by the judiciary’s discretion in remittitur. There was not a statute imposing limitations at

common law. As this Court acknowledged in *Overbey*, the reduction by section 510.265 is not because the punitive damage award was excessive but because of the “legislatively created limitation.” *Overbey*, 361 S.W.3d at 377. Section 510.265 imposes a new restriction on a common law cause of action and amounts to an unconstitutional violation of the separation of powers.

This Court should not look to *Fust v. Attorney General for the State of Missouri*, for reliance on the separation of powers as applied to common law causes of action. 947 S.W.2d 424 (Mo. banc 1997). *Fust*, held a statute awarding the state half of punitive damages after trial did not violate the separation of powers. 947 S.W.2d 424, 430-31 (Mo. banc 1997). *Fust* relies heavily on *Simpson v. Kilcher*, 749 S.W.2d 386 (Mo. banc 1988). *Fust*, 947 S.W.2d at 431. *Simpson*, holding the dram shop law did not violate the separation of powers, 749 S.W.2d at 391-92, was overruled by *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. banc 2000). *Fust* cites to *Simpson* in support of the proposition “placing reasonable limitations on common law causes of action is within the discretion of the legislative branch and does not invade the judicial function” *Fust*, 947 S.W.2d at 430-31. *Simpson* is not applicable because it involved a statutory created cause of action, not a common law cause of action. 749 S.W.2d at 391. Also, *Simpson*’s separation of powers argument is about the retroactive application of a statute, not restrictions on a cause of action. *Id.* *Fust*’s reliance on *Simpson* is misplaced and is unsupported and should not be followed.

Furthermore, *Watts* appears to reverse *Fust*’s position that “placing reasonable

limitations on common law causes of action is within the discretion of the legislative branch,” 947 S.W.3d at 430, when this Court found statutory caps applied to common law causes of action were an unconstitutional limitation on the common law. *See Watts*, 376 S.W.3d at 636. *Watts* overruled *Adams By and Through Adams v. Children’s Mercy Hosp.*, 832 S.W.2d 898, 907 (Mo. banc 1992), which held that the “legislature also has the power to limit recovery in those [common law] causes of action. *Watts*, 376 S.W.3d at 636. *Sanders* also appears to support this change as the Court made clear that the legislature could only change remedies that did not exist in 1820. *Sanders*, 364 S.W.3d at 205. *Fust* should no longer be followed for the proposition that the legislature may place reasonable limits on common law causes of action, thereby not violating the separation of powers as applied to common law cause of action.

This Court should also not follow *Overbey* and *Sanders*, which held section 510.265 limiting punitive damages and section 538.210 limiting non-economic damages, did not violate the separation of powers for statutory created causes of action. *Overbey*, 361 S.W.3d at 377-78; *Sanders*, 364 S.W.3d at 205. This is because the legislature can define the remedies in causes of actions it creates by statute. *Overbey*, 361 S.W.3d at 377-78; *Sanders*, 364 S.W.3d at 205. The emphasis placed on the statutory cause of action in *Overbey* and *Sanders* creates the appearance that punitive damages in common law causes of action are not subject to statutory limitation. In *Sanders*, this Court emphasized that the legislature “may negate causes of action or their remedies that did not exist prior to 1820.” *Sanders*, 364 S.W.3d at 205 (emphasis added). This Court

further explained, “the judiciary has the duty to prescribe the trial process and to protect those rights to jury trial as existed prior to 1820.” *Id.* Thus, Lewellen’s common law fraudulent misrepresentation cause of action is different from *Overbey* and *Sanders* because the legislature cannot change the remedy of punitive damages as it existed at common law.

At least one other court has found a statute limiting punitive damages violated the constitutional guarantee of separation of powers. The Arkansas Supreme Court found a statute limiting punitive damages violated a constitutional provision prohibiting the legislature from enacting laws limiting damages recovered for injuries in an employment relationship. *Bayer Corpscience LP v. Schafer*, 385 S.W.3d 822, 831 (Ark. 2011). The Arkansas court specifically noted that punitive damages are “an integrant” of the amount recovered. *Id.*

Article II, section 1, guarantees the separation of powers. The judiciary is the only branch with the power to declare, pronounce, and carry out a judgment. The judiciary’s discretion cannot be infringed upon by the legislature. Section 510.265 applied to a common law claim violates the separation of powers.

C. Section 510.265 violates the separation of powers as the legislature encroaches on the judiciary's power to pronounce and carry out a judgment and excludes the judiciary's discretion

Section 510.265 violates the separation of powers in that the legislature is encroaching on the judiciary's power to pronounce and carry out a punitive damage judgment and eliminates the discretion afforded to the judiciary by mandating the amount of punitive damages under section 510.265. This is an infringement on the judiciary's powers by the legislative branch as it pronounces the punitive damage award and eliminates judicial discretion.

Section 510.265 eliminates "the right that the people of Missouri have reserved to themselves, as jurors, to perform a vital role in the adjudication process." *Klotz*, 311 S.W.3d at 781 (Wolff, J. concurring). The assessment of punitive damages "is peculiarly committed to the jury and trial court's discretion." *Id.* The jury's vital role to determine punitive damages, *see Scott*, 176 S.W.3d at 142, is displaced by section 510.265 as the jury's assessment of punitive damages in excess of section 510.265 is disregarded. The court's discretion in finalizing the jury's verdict for punitive damages by procedural safeguards of judicial review and remittitur, *Barnett*, 963 S.W.2d at 661, is displaced by section 510.265 as the maximum amount of a punitive damage award is not within the court's discretion. The court no longer has discretion to reduce punitive damages by procedural safeguards when the punitive damage award exceeds the amount set forth in section 510.265.

Section 510.265 as applied to a common law cause of action violates the separation of powers because at common law a punitive damage judgment could only be reduced by remittitur. Section 510.265 is not remittitur and infringes on the judiciary's discretion to determine the amount of an award and eliminates discretion. Remittitur under Rule 78.10 is based on "the court's authority to grant a new trial, a practice consistent with the understanding at common law of the judge's power to control verdicts at the time the Missouri Constitution was adopted." *Klotz*, 311 S.W.3d at 778 (Wolff, J. concurring). Rule 78.10 is discretionary, allowing the trial court to reduce damages when the award is excessive. *Emery v. Wal-Mart Stores, Inc.*, 976 S.W.2d 439, 448 (Mo. banc 1998). The remitted award is applied only if the plaintiff chooses to accept it and waives a new trial. Rule 78.10. Section 510.265 is not remittitur because the trial court does not have discretion in remitting punitive damages that exceed the limits in section 510.265, and does not allow the plaintiff the option to have a new trial or accept the remitted amount. As applied to common law causes of action, section 510.265 violates the separation of powers as the legislature dictates the reduction of punitive damages and takes away the court's discretion of reducing punitive damages by remittitur.

Section 510.265 violates the separation of powers because the legislature prescribes the remedy. The legislature cannot prescribe remedies for common law causes of action because it did not create that right. *Overbey*, 361 S.W.3d at 377-78. At common law, there were no statutory restrictions on punitive damages. Section 510.265 prescribes the remedy of punitive damages for a common law cause of action when the

jury's verdict exceeds the limitations in section 510.265. The legislature by section 510.265 orders the trial court to pronounce a specific punitive damage amount when the jury's verdict exceeds the statutory limitations. Section 510.265 violates the separation of powers as it pronounces the punitive damage award in a common law cause of action when the jury's verdict exceeds the statutory limitations.

Here, the jury awarded Lewellen punitive damages of \$1,000,000 against Franklin for common law fraudulent misrepresentation. LF 541; App. A25. The trial court reduced the punitive damages to \$500,000 pursuant to section 510.265. LF 741, 743; App. A8, A10. The trial court did not reduce the punitive damages pursuant to remittitur, the weight of the evidence, or under a due process analysis. LF 741-44; App A8-A11. The punitive damage verdict was solely reduced pursuant to section 510.265. The trial court was not permitted to use its' discretion in what the amount of punitive damages should be or pronounce the judgment based on the jury's verdict of punitive damages and the facts of the particular case. Instead, the legislature decided what the punitive damage award would be.

Section 510.265 violates the separation of powers because it encroaches on the judiciary's discretion.

D. Conclusion

Section 510.265 is unconstitutional as it clearly contravenes the separation of powers doctrine in article II, section 1. By enacting section 510.265, the legislature prescribes the remedy of a punitive damage judgment in a common law fraudulent

misrepresentation cause of action. The legislature infringes on the judiciary's power to pronounce a punitive damage judgment by mandating the maximum amount a punitive damage judgment may be. The jury's discretion to determine punitive damages, based on the evidence and the court's instruction, is limited by the arbitrary amount the legislature deemed was the maximum amount that can be awarded. The court's discretion to reduce punitive damages based on the evidence is limited by section 510.265 mandating the maximum amount an award may be. Section 510.265 violates the separation of powers as the legislature infringes on powers vested to the judiciary and the judiciary's discretion.

III. The trial court erred in reducing Lewellen’s punitive damage award in a common law fraudulent misrepresentation cause of action pursuant to section 510.265, because section 510.265 violates Lewellen’s right to equal protection as guaranteed by article I, section 2 of the Missouri Constitution and the Fourteenth Amendment of the United States Constitution, in that the right to a trial by jury for a common law cause of action is a fundamental right and there is not a compelling state interest to restrict the jury’s assessment of punitive damages to punish and deter, or in the alternative there is no rational relationship in limiting punitive damages to achieve a legitimate end to have punitive damages punish and deter, thereby making the final punitive damage award for common law fraudulent misrepresentation inadequate.

A. Standard of Review

A constitutional challenge is reviewed *de novo*. *Watts*, 376 S.W.3d at 637. The presumption is a statute is constitutional. *Id.* A statute is unconstitutional if it “clearly contravenes a constitutional provision.” *Id.* The party challenging the statute bears the burden to prove the statute “clearly and undoubtedly violate[s] the constitution.” *Id.*

B. Article I, section 2 of the Missouri Constitution and the Fourteenth Amendment of the United States Constitution guarantees equal protection

The Equal Protection Clauses of the Missouri and United States Constitutions provide that all people are entitled to equal rights or equal protection under the law. Mo. Const. art. I, § 2, and U.S. Const. amend. XIV. Equal protection requires that “laws operate on

all alike.” *Doe v. Phillips*, 194 S.W.3d 833, 845 (Mo. banc 2006). A statute which classifies groups “may not treat similarly situated persons differently unless such differentiation is adequately justified.” *Id.*

1. Strict Scrutiny Review

When a classification affects a fundamental right, a strict scrutiny review is applied. *Doe*, 194 S.W.3d at 845. Strict scrutiny determines “whether the statute is necessary to accomplish a compelling state interest” and “whether the chosen method is narrowly tailored to accomplish that purpose.” *Id.*

Section 510.265 is subject to strict scrutiny review because the right to a trial by jury is a fundamental right for a common law cause of action. *See Watts*, 376 S.W.3d at 637-639. Section 510.265 is not necessary to achieve a compelling state interest and is therefore unconstitutional on equal protection grounds.

a. Classification

The parties subject to section 510.265 are classified into two distinct groups. Section 510.265 applies to parties in a civil lawsuit where punitive damages are awarded. The classifications are: parties in a civil lawsuit subject to the statutory limitations on punitive damages, and parties in a civil lawsuit exempt from the statutory limitations on punitive damages. The exempt class is defined by section 510.265 to include: the State as a plaintiff, defendants convicted of a felony arising out of the matter, and selected housing discrimination victims. Section 510.265.

This classification of groups subject to section 510.265 treats similarly situated

groups differently and is not adequately justified.

b. Fundamental Right

A fundamental right is one "deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Comm. for Educ. Equality v. State of Missouri*, 294 S.W.3d 477, 490 (Mo. banc 2009). A fundamental right is any right "explicitly or implicitly guaranteed by the Constitution." *In re Marriage of Woodson*, 92 S.W.3d 780, 784 (Mo. banc 2003). Missouri courts have traditionally followed the federal courts' determination of fundamental rights, but other provisions may be contained in the Missouri Constitution. *Comm. for Educ. Equality*, 294 S.W.3d at 490.

The right to a trial by jury is explicitly guaranteed by the Missouri and United States Constitutions. The United States Supreme Court held that a fundamental right is the right to trial by jury. *Hodges v. Easton*, 106 U.S. 408, 412 (1882); *see also Parklane Hosiery Co., Inc. v. Shores*, 439 U.S. 322, 338 (1979) (Rehnquist, dissenting) ("right of trial by jury in civil cases at common law is fundamental to our history and jurisprudence"). In *Watts*, this Court acknowledged that the right to trial by jury is "one of the fundamental guarantees of the Missouri Constitution." 376 S.W.3d at 637. *See also, McCormack v. Capital Elect. Constr. Co., Inc.*, 159 S.W.3d 387, 400 (Mo. App. W.D. 2004) (party waived "fundamental right" of a new trial when it accepted remitted award).

This Court has acknowledged that the right to a trial by jury as applied to punitive

damages is a fundamental right. *Scott*, 176 S.W.3d at 142-43. Chief Justice Teitelman and former Supreme Court Judge Wolff argued in their concurring opinions in *Klotz*, that the right to a trial by jury is a fundamental right, specifically in relationship to statutory limitations of non-economic damages. *Klotz*, 311 S.W.3d at 779, 782 (Wolff, J., concurring; Teitelman, J., concurring). Chief Justice Teitelman again argued in *Overbey* that the right to trial by jury is a fundamental right that cannot be limited by statute. 361 S.W.3d at 381 (Teitelman, J., dissenting).

This Court should follow *Watts*, which held that the right to trial by jury is a fundamental right in a common law cause of action. *Watts*, 376 S.W.3d at 637-38. Lewellen's case is common law fraudulent misrepresentation. LF 291-95. *Overbey* and *Sanders*, which held a trial by jury is not a fundamental right in statutory created causes, is not applicable and should not be followed as Lewellen brought a common law cause of action. *Overbey*, 361 at 378 n.6; *Sanders*, 364 S.W.3d at 204, LF 291-95, 740.

Additionally, this Court's rationale in *Fust*, 947 S.W.2d at 431-32, should not be extended here. In *Overbey*, the denial of the equal protection argument referred to *Fust*. *Overbey*, 361 S.W.3d at 378 n.6. There should be great reservation and hesitation about following *Fust* for two reasons. First, *Fust* never mentions the right to trial by jury, it was not one of the rights considered in that equal protection challenge. *Fust*, 947 S.W.2d at 431-32. Second, it appears *Fust* was decided upon suspect classification, specifically concerning the differences between plaintiffs who went to trial, settled, or were in federal court. *Id* at 432. In the equal protection argument there is no mention of fundamental

rights. *Id.* *Fust* should not be relied upon in the equal protection argument because it did not involve a fundamental right.

The right to a trial by jury in a common law cause of action is a fundamental right. The right to a trial is specifically guaranteed in the Missouri Constitution and the United States Constitution. This Court and the United States Supreme Court have held that the right to a trial by jury is a fundamental right. This Court has held that a jury is to determine punitive damages. *Scott*, 176 S.W.3d at 142-43. At common law, there were no restrictions on the right to a trial by jury. Lewellen has a fundamental right to a trial by jury for her common law fraudulent misrepresentation claim seeking punitive damages.

c. Necessary to Achieve a Compelling State Interest

The compelling state reason to have punitive damages is to punish and deter similar conduct. The United States Supreme Court has held punitive damages advance “a State’s *legitimate* interest in punishing unlawful conduct and deterring its repetition.” *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (emphasis added). Another compelling interest of punitive damages includes providing meaningful access to the court and funding the Tort Victims’ Compensation Fund. The reason for enacting section 510.265 was to limit a defendant’s exposure to punitive damage awards. This is not a legitimate compelling state interest. There is no state interest in arbitrarily limiting the amount of punitive damages a defendant is liable for, solely to protect a defendant’s financial assets, when the defendant’s outrageous conduct was by evil motive or reckless

indifference to others.

Section 510.265 is not necessary to achieve a legitimate compelling state interest. The most compelling state interest to have punitive damages is to civilly punish and deter others from engaging in similar conduct. *Overbey*, 361 S.W.3d at 382 (Teitelman, J. dissenting). Restricting the amount of punitive damages a defendant is subject to does not assist in punishing and deterring, especially when the maximum amount is based on an arbitrary figure and not the facts of the specific case. Limiting a punishment or deterrence is not necessary to achieve the compelling state interest of punishing and deterring similar conduct.

Section 510.265 is also not necessary to achieve the state interest of providing access to the courts. Chief Justice Teitelman's argument in *Klotz* that section 538.210, the limitation of non-economic damages, is not narrowly tailored because cases with lower actual damages are less likely to be filed applies to section 510.265. *Klotz*, 311 S.W.3d at 782 (Teitelman, J., concurring). The logic of Chief Justice Teitelman's argument is that cases with small actual damages but the potential for large punitive damages due to the wanton and willful conduct will not be filed due to the limitations imposed by section 510.265. This is because there are expenses in filing a case and with small actual damages and limited punitive damages, potential plaintiffs may have a difficult time finding an attorney to take their case. *See Klotz*, 311 S.W.3d 752, 782 (Teitelman, J., concurring). Limiting punitive damages is not necessary to achieve the compelling interest of providing access to the courts.

The third compelling state interest is assisting tort victims with the Tort Victims' Compensation Fund. In 1987, the legislature established the Fund to compensate plaintiffs whose judgments were not satisfied. Section 537.675-.678, App. A16-A19. Fifty percent of punitive damages awarded at a jury trial are used to fund this Fund. Section 537.675, App. A16-A17. Currently the Fund is unfunded and has not paid out claims since January 2012. *See* Mo. Dept. of Labor & Industrial Relations, *Payment of Claims*, available at http://labor.mo.gov/DWC/Tort_Victims/payment_claim.asp. App. A36. Section 510.265 does not promote the state interest of funding the Tort Victims' Compensation Fund to assist in compensating victims because section 510.265 restricts the amount of damages that will be paid into the Fund. Section 510.265 seeks to reduce the punitive damages a defendant would pay and therefore reduces the funds available to compensate victims. The classification of section 510.265 is not necessary to achieve the state interest in funding the Tort Victims' Compensation Fund because it limits the funding available.

There is no compelling state interest in limiting a defendant's exposures to punitive damage awards. It appears the purpose of tort reform in 2005, including section 510.265, was to limit a defendant's financial exposure and increase business. There is no compelling reason to protect a defendant's financial assets. Defendants have responsibilities and duties, and they become involved in litigation and subject to punitive damages when they violate those responsibilities and duties. Defendants have the right to a fair trial, to argue against or for lower punitive damages to the jury, and urge the trial

court to reduce punitive damages by remittitur or on due process grounds. The reason a jury awards punitive damages in excess of section 510.265, is because they found the defendant's outrageous conduct due to the defendant's evil motive or reckless indifference to others a large amount was necessary. The award may be prejudicial to the defendant, but that is due to the defendant's prejudicial conduct. There is no compelling state reason to limit a defendant's exposure to punitive damages therefore section 510.265 is not necessary to achieve this non legitimate interest.

Section 510.265 is not necessary to achieve a compelling state interest. There is no compelling state interest that is accomplished by section 510.265.

d. Narrowly Tailored

Section 510.265 is not narrowly tailored to achieve a compelling state interest. Exempting the State as a plaintiff, defendants convicted of a felony arising out of the civil action, and selected housing discrimination plaintiffs from the statutory limitations on punitive damages does not make the section 510.265 narrowly tailored. Section 510.265. Exempting these groups does not advance the compelling state interests of punishing and deterring, providing access to courts, or funding the Tort Victims' Compensation Fund, because it is a very limited number of punitive damages that are subject to unlimited punitive damage awards.

Section 510.265 is also not narrowly tailored as it places a generic and arbitrary amount as the statutory limitation of punitive damages. This generic and arbitrary amount does not help achieve a compelling state interest because the limitation on

punitive damages prevents a proper punishment and deterrence effect.

Section 510.265 is not narrowly tailored as it does not help achieve a compelling state interest. By restricting who is exempt and the amount of punitive damages, section 510.265 prohibits a compelling state interest to be advanced.

e. Conclusion

Section 510.265 is subject to a strict scrutiny review. The right to a trial by jury in a common law cause of action is a fundamental right. Section 510.265 is not necessary to achieve a compelling state interest and is not narrowly tailored to do so. Section 510.265 is unconstitutional as it clearly contravenes the equal protection clauses of Constitutions of Missouri and the United States.

2. Rational Basis Review

If this Court should reject the right to trial by jury in a common law cause is a fundamental right, then the rational basis review is appropriate. The rational basis standard determines if the statute has a rational relationship to achieve a legitimate end. *Doe*, 194 S.W.3d at 845. The underlying social or economic policies of a statute are not questioned. *Comm. for Educ. Equality*, 294 S.W.3d at 491.

A legitimate end of punitive damages is to punish defendants and deter similar conduct. *Overbey*, 361 S.W.3d at 382 (Teitelman, J., dissenting). Section 510.265 does not have a rational relationship to achieve this legitimate end as it imposes an arbitrary amount for the maximum award of punitive damages, regardless of the facts and circumstances of the case. There is no relationship in arbitrarily limiting the amount of

punitive damages to punish and deter defendants in their conduct. Section 510.265 has no rational relationship to achieve a legitimate end of having punitive damages.

Section 510.265 is unconstitutional under a rational basis review because there is no rational relationship to achieve a legitimate end.

C. Conclusion

Section 510.265 clearly violates the Equal Protection Clauses of the Constitutions of Missouri and the United States. The right to trial by jury in a common law cause of action is a fundamental right. Section 510.265 is not necessary to achieve a compelling state interest and is not narrowly tailored to do so. Under a strict scrutiny standard of review, section 510.265 is unconstitutional as it clearly contravenes the constitutional provision of equal protection. In the alternative, section 510.265 is unconstitutional under a rational basis review. Section 510.265 has no rational relationship to a legitimate end. The legitimate end of punishing and deterring is not related to limiting punitive damage awards to an arbitrary amount. Section 510.265 is unconstitutional as it clearly contravenes the Equal Protection Clauses of the Missouri and United States Constitutions.

IV. The trial court erred in reducing Lewellen’s punitive damage award in common law fraudulent misrepresentation cause of action pursuant to section 510.265, because section 510.265 violates the due process clause of article I, section 10 of the Missouri Constitution and the Fourteenth Amendment of the United States Constitution, in that section 510.265 changes the substantive law for common law fraudulent misrepresentation and is a mathematical bright line thereby eliminating a due process review of the jury’s punitive damage verdict, making Lewellen’s punitive damage award for common law fraudulent misrepresentation inadequate as it was not reviewed for being excessive.

A. Standard of Review

A constitutional challenge is reviewed *de novo*. *Watts*, 376 S.W.3d at 637. The presumption is a statute is constitutional. *Id.* A statute is unconstitutional if it “clearly contravenes a constitutional provision.” *Id.* The party challenging the statute bears the burden to prove the statute “clearly and undoubtedly violate[s] the constitution.” *Id.*

B. Article I, section 10 of the Missouri Constitution and the Fourteenth Amendment of the United States Constitution guarantees due process.

The due process clauses of the United States and Missouri Constitutions guarantee that a person may not be deprived of “life, liberty, or property, without due process of law.” U.S. Const. amend XIV, Mo. Const. art. I, §10. Punitive damage awards are subject to due process review. *Gore*, 517 US at 568 (1996). Due process is satisfied

when the punitive damage award corresponds to the defendant's conduct and harm. *Id.*

Punitive damages are reviewed to ensure it complies with due process. Due process is satisfied when the award is "reasonably necessary to vindicate the State's legitimate interest in punishment and deterrence." *Id.* at 568. At common law, punitive damages were reviewed to ensure the award is reasonable. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 US 1, 15 (1991) (O'Connor, concurring in part, dissenting in part). The United States Supreme Court has found the common law approach of reviewing punitive damages is within the 14th Amendment. *Id.* at 17.

The review of punitive damages has also evolved into three guideposts to determine if the punitive damage is reasonable. *See Gore*, 517 U.S. at 574; *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). The three guideposts now used in a due process review are: "(1) the reprehensibility of the defendant's misconduct; (2) the disparity between the harm and the punitive award; and (3) the difference between the punitive award and penalties authorized or imposed in comparable cases" to determine if the punitive damage award is excessive. *Scott*, 176 S.W.3d at 144 (*citing State Farm*, 538 U.S. at 418) (Teitelman, J., concurring).

The courts have repeatedly acknowledged that there is no "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Haslip*, 499 U.S. at 18; *Scott*, 176 S.W.3d at 144. Larger ratios of punitive damages to actual damages may result from a "particularly egregious act" with small actual damages and comply with due process. *State Farm*, 538 U.S. at 425. "The

precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.* An arbitrary ratio is not imposed because punitive damages advance the State's interest in punishing and deterring. *Scott*, 176 S.W.3d 144 (Teitelman, J. concurring).

Punitive damage awards are subject to due process to ensure the award is reasonable.

C. Section 510.265 applied to common law fraudulent misrepresentation violates due process

As applied to a common law fraudulent misrepresentation cause of action, section 510.265 violates due process in two ways. First, section 510.265 is a statutory modification of a common law cause of action. Second, it imposes the very arbitrary ratios and mathematical bright lines that have been forbidden as it does not take into account the facts and circumstances of the particular case.

Section 510.265 is a substantive change to common law fraudulent misrepresentation by changing the amount of punitive damages that may be awarded. The legislature may only prescribe the remedies of a cause of action it creates. *See Overbey*, 361 S.W.3d at 381 ("substantive right to recover under that statute [MMPA] was limited by section 510.275 (sic)"). The legislature cannot change the remedies in a common law cause of action that existed prior to 1820. *Sanders*, 364 S.W.3d at 205. The proposition in *Adams*, 832 S.W.2d at 905-06, and *Fust*, 947 S.W.2d at 430-31 that the legislature may modify common law has been reversed by *Watts*, 376 S.W.3d at 638-40

and *Sanders*, 364 S.W.3d at 205. Section 510.265 changes common law as the maximum amount of punitive damages is \$500,000 or five times the net damages, except if one of the statutory exceptions applies.

Section 510.265 is a substantive change to common law fraudulent misrepresentation and thereby violates due process as the jury's verdict is not subject to a due process review to determine if an award is reasonable. At common law, punitive damages were subject to a "traditional common-law approach" of due process in which "the amount of the punitive damage award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct." *Call*, 925 S.W.2d at 848 (quoting *Haslip*, 449 U.S. at 15). Then the trial and appellate courts review the jury's verdict to ensure it is reasonable. *Id.* This common law approach passed "constitutional muster." *Id.*

Section 510.265 substantively changes the common law remedy by mandating a reduction instead of the discretionary due process review. Section 510.265 modifies the remedies available while violating the right to due process. As this Court acknowledged in *Overbey*, when a punitive damage judgment is reduced pursuant to section 510.265, it is "not based on a finding that the damages are excessive but rather on a legislatively created limitation on punitive damages." 361 S.W.3d at 377. This Court also acknowledged a due process review was not necessary because the punitive damages have already been reduced pursuant to section 510.265. *Overbey*, 361 S.W.3d at 372. Section 510.265 prevents a due process review of the jury's verdict and makes a due

process review of the statutorily reduced punitive damage judgment irrelevant since it has already been reduced.

The substantive remedy of punitive damages is changed by section 510.265 and as a result due process is denied. All parties are entitled to have the jury's verdict for punitive damages reviewed for due process to ensure it is reasonable. Otherwise, section 510.265 gives superior constitutional protection to the defendant as the court is mandated to reduce the punitive damage judgment without any constitutional consideration as to whether the punitive damage award complies with due process. Section 510.265 changes the common law as it imposes limits on punitive damages and eliminates the due process review.

Second, section 510.265 is the arbitrary ratio and mathematical bright line that courts have repeatedly rejected. The courts have continuously held there is no "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Haslip*, 499 U.S. at 18; *Scott*, 176 S.W.3d at 144. Section 510.265 is an arbitrary ratio and mathematical bright line. Section 510.265 imposes an amount the legislature thought would be an appropriate amount for all punitive damage awards. There is no consideration of the "facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm*, 538 U.S. at 425.

Section 510.265 violates due process in that it imposes this arbitrary amount of what an appropriate punitive damage judgment should be, at least according to the legislature. The punitive damage award is not based on the evidence or circumstances of

the particular case. Section 510.265 is the arbitrary ratio the courts have refused to impose because of due process.

Section 510.265 violates due process as section 510.265 changes the substantive remedy for common law fraudulent misrepresentation by modifying the remedy and imposes an arbitrary amount of punitive damage judgments.

D. Conclusion

Section 510.265 violates due process by eliminating due process review of punitive damages when punitive damages are subject to section 510.265. Section 510.265 is unconstitutional as it clearly contravenes the right to due process.

CONCLUSION

For the reasons set forth herein, Lewellen respectfully submits that this Court declare section 510.265 unconstitutional as it applies to common law fraudulent misrepresentation, reverse the decision of the trial court, which reduced the punitive damage award from \$1,000,000 to \$500,000, and remand the case to the trial court for reinstatement of the full jury award of \$1,000,000 in punitive damages in favor of Lewellen.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief contains the information required by Rule 55.03 and complies with the limitations of Rule 84.06(b). Relying upon the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this Brief is 14,722 and has been prepared using Microsoft Word in 13 pt. Times New Roman font.

/s/ Douglass F. Noland

DOUGLASS F. NOLAND

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of February, 2013, I electronically filed the foregoing Appellant's Brief with the Clerk of the Supreme Court using the E-Filing system, which sent notification of such filing to the following:

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